IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1775

CARL A. MORSE, INC. (Diesel Construction, a division), individually and on behalf of trust beneficiaries of funds accruing for the construction of an improvement of real property at Tax Block 3605, Lot 1, Queens, New York,

Plaintiff-Appellee,

against

RENTAR INDUSTRIAL DEVELOPMENT CORP., RENTAR INDUSTRIAL DEVELOPMENT ASSOCIATES, VERTICAL INDUSTRIAL PARK ASSOCIATES, ARTHUR RATNER, DENNIS RATNER AND MARVIN RATNER,

Defendants-Appellants,

and

THE CITY OF NEW YORK, ROBERT HALL METROPLEX CENTER CORP., R. H. MACY & CO., INC., STONE SUPPLY CO., INC., BLACKMAN-SHAPIRO CO., INC., A TO Z EQUIPMENT CORP., GLOBE PIPE & FITTING CO., INC., ABCO INDUSTRIAL SUPPLY CORP., CARPENTER AND PATERSON OF NEW YORK, INC., NEILL SUPPLY CO., INC., BALTIMORE AIRCOOL COMPANY, a subsidiary of MERCK & COMPANY, INC., MATERIAL STRENGTH, INC., ALBERT SAGGESE, INC., RAC MECHANICAL, INC., SAL PICONE & SONS, INC., ALBERT PIPE SUPPLY CO., INC., MUNRO WATERPROOFING, INC., HANLEY COMPANY INCORPORATED, JOEL J. CHAIT PLUMBING & HEATING CORP., J. C. EXCAVATION CORP., TRIPLE M. ROOFING CORP., REUTHER MATERIAL CO., PETROLEUM FOR CONTRACTORS, INC., NATIONAL LIGHTING SUPPLY CO., INC., KELLEY COMPANY, INC., FLOCKHART FOUNDRY COMPANY, STYRO SALES COMPANY, INC., CONTRACTORS SUPPLY CORP., MASON MIX, INC., ADVANCED AIR CONTROL CORP., LIGHTING ASSOCIATES, INC., STANTON SAMSON CORP., WORTH SUPPLY CO., INC., ROBERT E. LEVIEN, PRINCE CARPENTRY, INC., LITEMORE ELECTRIC CO., INC. and SCHECTMAN CARPENTRY, INC., ARGONAUT INSURANCE COMPANY, BILLEN AIR CONDITIONING, INC. and REVO MECHANICAL INC.,

Defendants.

MOTION TO DISMISS OR AFFIRM

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Defendants.

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein on the ground that it does not present a substantial federal question or, in the alternative, to affirm the order of the New York Court of Appeals on the ground that the questions raised by the appeal are so unsubstantial as not to need further argument.

I

The Statute Involved

Appellants challenge the constitutionality of New York's Mechanics' Lien Law, which appears as Article 2 of the New York Lien Law (McKinney 1966). The applicable provisions of the Mechanics' Lien Law are set forth in Appendix C to Appellants' Jurisdictional Statement, with one exception: The version of Section 34 of the Lien Law set forth at page 16a of the Appendix is a recent amendment and is not applicable to this case. At the time this case arose, Section 34 provided as follows:

> "§34 Waiver of Lien
>
> A contractor, subcontractor, material man or laborer may not waive his lien, except by express agreement in writing specifically to that effect, signed by him or his agent."

II

Statement of the Case

Introduction

The Statement of the Case set forth in Appellants' Jurisdictional Statement does not accurately define the issues involved in this appeal. Appellants' constitutional argument turns on a number of unproved factual premises. The key issues of fact are very much in dispute, and, unless all are resolved in Appellants' favor, their constitutional argument must fail. The New York courts chose to reach the constitutional question, evidently concluding that, even if Appellants' factual premises are valid, the Mechanics' Lien Law is constitutional. Appellee argued in the New York courts and submits to this Court that on the record of this case the Mechanics' Lien Law may be upheld but may not be declared unconstitutional.

Statement of Facts

This case involves a contract dispute between the Appellants, who are owners and developers of real property, and the Appellee, who is a construction manager. The parties are all competent, experienced and sophisticated masters of their respective crafts.

On May 15, 1972, the parties entered into a written agreement pursuant to which Appellee agreed to manage and supervise the construction of a massive new "Vertical Industrial Park" in New York City for Appellants, the owners of the property, and to act as the Appellants' agent for certain purposes. Appellants agreed to pay Appellee a fee for performing these services and to reimburse Appellee for certain costs and expenses.

The Vertical Industrial Park was in fact built, and the building, a warehouse complex containing approximately

1,700,000 square feet of floor space, was occupied upon completion by Appellants' tenants. Appellants do not contend that the filing of the mechanic's liens interfered in any way with the completion of the building, with its use and occupancy by Appellants and their tenants, or with the payment by the tenants and collection by the Appellants of rents.

Appellee performed work under the contract and submitted regular requisitions for payment of its fees and reimbursements of its expenses. Appellants made their payments to Appellee under the contract on a more-or-less regular basis until September 19, 1974. After that date Appellants refused to honor Appellee's requests for payment of fees and reimbursements in the amount of $1,009,983.66. In November, 1974, Appellee filed four notices of mechanic's liens totalling $1,003,983.66 pursuant to §10 of the Mechanics' Lien Law.

On December 19, 1974, Appellants made a written demand on Appellee pursuant to Lien Law §38 for a verified itemized statement specifying the basis of its liens. Appellee delivered its verified statement, consisting of more than 500 pages, on April 9, 1975.

Pursuant to Lien Law §19, on August 8, 1975, Appellants discharged the liens by posting a bond in the amount of $1,171,000.00.

Following the discharge of the liens, Appellants obtained a permanent mortgage loan from the Bowery Savings Bank, pursuant to a pre-existing commitment, in the amount of $38,700,000. This loan refinanced Appellants' construction loan from Manufacturers Hanover Trust Company. Appellants concede that the Bowery loan was obtained at an interest rate of 8.25% at a time when market interest rates were at least 9%. Appellants themselves characterize these

as "extremely favorable terms", and acknowledge that they saved many hundreds of thousands of dollars in additional interest that would have been charged on the prevailing market by any other lender.

The essence of Appellants' constitutional claim is that the filing of the notices of lien "almost" destroyed their ability to obtain the mortgage loan from Bowery. Appellee disputes this and points out that the most Appellants have actually alleged is that they had some difficulty in obtaining the loan at a below market interest rate. Appellants attribute this difficulty to a requirement that the Bowery loan be a first lien on the property. Appellee disputes this conclusion, because, as a matter of New York law, both the Manufacturers Hanover construction loan and the Bowery refinancing loan were senior to Appellee's mechanic's liens, or at least would be senior if the banks themselves had managed the loans properly.

Significantly, Appellants do not allege that they would have been unable to obtain permanent mortgage financing at a market interest rate and on normal terms from the Bowery or another lender. Indeed, it is clear from the Statement of the Case that Appellants have not been damaged at all: at a cost of $17,210 per year, plus some legal fees, they have managed to mortgage the property on "extremely favorable terms" and to enjoy the use of more than $1 million of Appellee's money for nearly four years.

At the time the agreement between the parties was entered into, a contractor, laborer or materialman could waive his right to file mechanic's liens under the then-existing version of §34.* Although Appellants were suc-

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* The amendment to §34 set forth in Appellants' Appendix C was not retroactive; and thus any waiver obtained by Appellants would still be valid, *Garber Building Supplies, Inc.* v. *Community National Bank and Trust Co. of New York*, —— A.D. 2d ——,

cessful in obtaining such waivers from other contractors on the Vertical Industrial Park, they did not obtain a waiver from the Appellee. Appellee asserts that Appellants knew full well when the contract was signed that Appellee would have recourse to the Mechanics' Lien Law in any dispute over payment and that the right to such recourse was part of the bargained-for consideration of the contract. Appellants dispute this and argue that Appellee's agreement to act as an agent for some purposes precludes it from resorting to mechanic's liens.

The Proceedings to Date

Appellee's notices of mechanic's liens were filed in November, 1974. In December, 1974, Appellants commenced an action against Appellee for breach of contract, seeking damages of approximately $6 million. On April 2, 1975, Appellee commenced this action for foreclosure of its mechanic's liens. This lien foreclosure action and Appellants' breach of contract action will be tried jointly.

On August 15, 1975, after answering the complaint in the lien foreclosure action and serving a counterclaim, Appellants moved for partial summary judgment dismissing Appellee's mechanic's liens on the ground that the procedures of the Mechanics' Lien Law, *as applied to the "unique factual situation" of this case,* resulted in a deprivation of Appellants' property by state action without due process of law in violation of the 14th Amendment to the Constitution of the United States.*

400 N.Y.S. 2d 845 (2d Dep't 1977); ***Michael Duff, Inc.*** v. ***Fair Housing Development Fund Corporation, et al.***, 56 A.D. 2d 575, 391 N.Y.S. 2d 451 (2d Dep't 1977); ***Rotodyne, Inc.*** v. ***Consolidated Edison Co. of N.Y.***, 55 A.D. 2d 600, 389 N.Y.S. 2d 387 (2d Dep't 1976).

* Appellants also based their motion for partial summary judgment on the ground that Appellee, by agreeing to act as Appellants' agent for certain purposes, disqualified itself from filing notices of mechanic's liens. The New York Courts held that Appellee's agreement to serve as an agent for certain purposes did not amount, as a matter of law, to a surrender of its right to file notices of mechanic's liens, but that a triable issue of fact existed as to whether or not its services as agent are lienable within the meaning of the Lien Law.

Appellants' motion for partial summary judgment was denied by the Supreme Court. This denial was affirmed by the Appellate Division of the Supreme Court, Second Department, and the Court of Appeals affirmed the Second Department's order. Appellants are now before this Court on appeal.

III

The Questions Involved

This appeal presents three questions of law for review:

1. Are there disputed issues of fact in this case that preclude a decision by this Court on the constitutional questions raised by the Appellants?

2. Did the filing by Appellee of the notices of mechanic's liens deprive Appellants of their property by state action within the meaning of the 14th Amendment?

3. If the filing by Appellee of its mechanic's liens was state action that deprived Appellants of their property within the meaning of the 14th Amendment, was such deprivation effected without due process of law?

IV
ARGUMENT

A. Introduction

The filing of a notice of mechanic's lien does not affect the owner's possession or use of the property, nor does it impose any legal restriction on the sale, mortgaging or other disposition of the property. It serves merely to put third persons on notice of the existence of the lienor's claim. Under §3 of the Mechanics' Lien Law, only a person who has improved real property ". . . at the request or with the consent of the owner . . ." is entitled to file a notice of lien, and the amount of the lien is limited to ". . . the value, or the agreed price . . ." of the lienor's work.*

The substance of the Appellants' argument to the Court is that New York's statutory recognition of the mechanic's lien and the procedures that New York provides for giving notice of this lien to third persons through the recording system amounted, on the facts of this case, to a deprivation of the Appellants' property without due process of law. For the reasons that will be explained below, this argument is particularly inappropriate in this case, and the questions raised by the Appellants are without substance.

B. The Order of the New York Court of Appeals Should Be Affirmed Because the Record of the Case Cannot Support a Conclusion That New York's Mechanics' Liens Law Is Unconstitutional

The New York courts have not resolved the factual issues upon which Appellants' claim of unconstitutionality turns. A question of fact exists in this case as to whether the final bargain struck between the parties contemplated

* The full text of §3 appears at p. 5a of Appendix C to Appellants' Jurisdictional Statement.

resort by Appellee to the mechanic's lien remedy in the event of a dispute over payment. Appellee argues that the contract contemplated that it would have recourse to mechanic's liens in any payment dispute. Appellants argue that Appellee, because it agreed to act as their agent, was not to have recourse to mechanic's liens. Therefore, even if this Court has reservations as to the constitutionality of the Mechanics' Lien Law, the record of the case does not support an invalidation of the Appellee's mechanic's liens; because if it is established at a trial that Appellee performed lienable services and that the parties bargained for a relationship that contemplated recourse to mechanic's liens, the matter would be governed squarely by *D. H. Overmyer Co., Inc.* v. *Frick Co.*, 405 U.S. 174 (1972).

The other factual issue on which Appellants' constitutional argument turns is whether or not the filing of the notices of lien was, in fact, the cause of Appellants' alleged difficulties in closing a mortgage loan with Bowery Savings Bank. The Bowery loan was a refinancing of a Manufacturers Hanover Trust Company construction loan and under New York law was senior to the Appellee's mechanic's liens or could have been made so. It is unlikely, therefore, that the mere fact of the filing of the notices of lien was a genuine obstacle to Bowery's making the loan. It is more likely that Bowery was attempting to avoid its pre-existing commitment to lend money at 8.25% at a time when prevailing interest rates had risen to at least 9%.

The New York Court of Appeals did not address these issues of fact, but rejected Appellants' constitutional arguments on their merits. While the record of the case supports this action, it would nct be possible on the same record to deprive Appellee of its liens; because Appellants have not been put to their proof, and it cannot be determined at this stage of the proceedings if there is any fac-

tual basis for their constitutional claims. Therefore the order of the New York Court of Appeals denying Appellants' motion for partial summary judgment should be affirmed, *Cedar Rapids Gas Light Co.* v. *City of Cedar Rapids,* 223 U.S. 655 (1912).*

C. The Questions Raised by the Appellant Have Already Been Decided by This Court

In *Spielman-Fond, Inc.* v. *Hanson's, Inc.,* 417 U.S. 901 (1974), the Court summarily affirmed a decision of a three judge District Court upholding the validity of Arizona's Mechanics' Lien Law. Arizona's Mechanics' Lien Law does not differ in any constitutional sense from the New York Mechanics' Lien Law. The Court's summary affirmance of the District Court's holding that the filing of a mechanic's lien under Arizona law does not amount to a taking of a significant property interest disposes of this case as well. Indeed, the case at bar is even more compelling. In *Spielman-Fond,* the plaintiffs at least alleged that they were unable to alienate their property freely. Here Appellants concede that they were able to mortgage theirs and allege only that the notices of lien "almost" prevented them from closing a mortgage loan at a below-market interest rate.

Appellants have not alleged that they are unable to use their property or that they are unable to earn a fair return on their investment. Clearly, a public purpose is served by the Mechanics' Lien Law. See *Cook* v. *Carlson,* 364

* The existence of these unresolved issues of fact raises the possibility that the order of the New York Court of Appeals from which this appeal is taken is not a "final judgment or determination" of that Court within the meaning of 28 U.S.C. §1257(2). See *Department of Banking of Nebraska* v. *Pink,* 317 U.S. 264 (1942), *rehearing denied* 318 U.S. 802 (1944); *Gospel Army* v. *City of Los Angeles,* 331 U.S. 543 (1946).

F. Supp. 24 (D.S.Dak. 1973). Therefore, even if the filing of the notices of mechanic's liens has affected the value that a purchaser or mortgagee would give for the property, such filing was not a "taking" of constitutional proportions. See *Penn Central Transportation Company, et al.* v. *City of New York,* 46 U.S.L.W. 4856 (1978).

The filing of the notices of lien in this case involved a far lesser interference with the Appellants' property than the dispossessions involved in *Flagg Brothers, Inc.* v. *Brooks, et al.,* 46 U.S.L.W. 4438 (1978), *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601 (1975); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) and *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969). All that has happened so far in this case is that notices of lien have been filed. The New York courts will supervise the ultimate resolution of the issues and the ultimate disposition of Appellants' property. See also *Sharrock* v. *Dell Buick-Cadillac, Inc.,* —— N.Y. 2d —— (1978) decided by the New York Court of Appeals on July 11, 1978 (Number 421) where the Court held that a garageman's lien may be imposed without judicial supervision but that judicial supervision is required for its enforcement.

The Court in *Flagg Brothers* observed that the bailor had not alleged that she was prevented by law from obtaining a waiver by the bailee of its right to enforce the warehouseman's lien. In the case at bar, it is clear that the Appellants were not precluded from seeking such a waiver; it is equally clear that they did not get one from the Appellee although they were successful in obtaining waivers under former §34 from other contractors on the project. *Cf.: D.H. Overmyer Co., Inc.* v. *Frick Co., supra.*

D. Even if the Filing of a Notice of Lien Under the New York Mechanics' Lien Law is a Taking of Property by State Action, the Procedures Under the Law Afford the Property Owner Due Process of Law

Even if Appellee's giving of notice to third persons of the existence of its claim by filing notices of mechanic's liens is viewed as a taking of property, the procedures under the Lien Law fully satisfy the constitutional requirement of due process.

Once a notice of lien has been filed, the Lien Law affords a property owner a variety of procedures for seeking immediate judicial review of the lien, which he can invoke if the lien is invalid on its face, exaggerated, based on a fraudulent claim or otherwise lacking in bona fides or substance.

Under Lien Law §19(6), an owner may commence a summary proceeding for the discharge of a lien if it "appears from the face of the notice" that the lien is invalid, if the notice does not contain information required by §9 or if it was not filed in accordance with §10.

Under Lien Law §38, an owner may require a lienor to submit a written itemized statement setting forth the nature of the labor and materials furnished on which the lien is based and the terms of the contract under which the work was done. Armed with such a statement, the owner may seek discharge of the lien in a summary proceeding under §19(6). The statement will be considered as the lienor's "bill of particulars" in determining whether or not the notice, including the verified statement, is sufficient on its face. *Application of J.D.H. Builders, Inc.*, 155 N.Y.S.2d 121 (Sup. Ct., Nassau County 1956); *Application of Jory Construction Corp.*, 158 N.Y.S. 2d 632 (Sup. Ct., Westchester County 1956).

If the owner believes that the lien has been exaggerated, he may raise this issue in a trial on the merits of the underlying action or "in any action or proceeding . . . in which the validity of the lien is in issue. . ." (Lien Law §39) including a summary proceeding under §19(6).

Shortly after the filing of the liens, Appellants requested, and Appellee duly delivered, a verified statement pursuant to §38. Appellants did not, however, exercise their right to seek an immediate judicial hearing to determine whether or not the notice, including the verified statement, made out a prima facie case for the validity of Appellee's lien, or to determine whether or not the lien had been exaggerated. Instead, justifiably fearful of the outcome of such a hearing, Appellants attempted to avoid a searching factual inquiry by challenging the constitutionality of the Mechanics' Lien Law in a motion for summary judgment.

V

CONCLUSION

Wherefore, Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the New York Court of Appeals.

Respectfully submitted,

July, 1978

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